

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs

---

1991

# T. E. Wherry v. Wesley F. Sine and Melva Sine : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Dean H. Becker.

Clark W. Sessions; Campbell, Maack & Sessions.

---

### Recommended Citation

Petition for Certiorari, *Wherry v. Sine*, No. 910577.00 (Utah Supreme Court, 1991).

[https://digitalcommons.law.byu.edu/byu\\_sc1/3782](https://digitalcommons.law.byu.edu/byu_sc1/3782)

This Petition for Certiorari is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

KFU

BRIEF

45.9

.S9

DOCKET NO. 910577

DEAN H. BECKER #261

Attorney for Defendants

349 South 200 East #170

Salt Lake City, Utah 84111

Telephone: 801-531-0494

---

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---

T. E. WHERRY, T.E. WHERRY, JR. : PETITION FOR WRIT OF CERTIORARI  
JAMES I. WHERRY, custodian, :  
ANITA I. WHERRY, custodian, :  
GAYLE W. WHERRY, JEFFREY E. :  
JENSEN, custodian, SEAN D. :  
JENSEN, custodian, and JESSICA :  
A. JENSEN, custodian. :

Plaintiffs, :

vs. :

Case No. 900406-CA

WESLEY F. SINE and MELVA SINE :

Defendant. :

910577

---

PETITION FOR WRIT OF CERTIORARI

DEAN H. BECKER #261  
349 South 200 East #170  
Salt Lake City, Utah 84111  
Telephone: 801-531-0494

CLARK W. SESSIONS  
CAMPBELL, MAACK & SESSIONS  
First Interstate Plaza  
#400  
170 South Main  
Salt Lake City, Utah 84101

FILED

DEC 30 1991

CLERK SUPREME COURT  
UTAH

DEAN H. BECKER #261  
Attorney for Defendants  
349 South 200 East #170  
Salt Lake City, Utah 84111  
Telephone: 801-531-0494

---

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

---

|                                |   |                                 |
|--------------------------------|---|---------------------------------|
| T. E. WHERRY, T.E. WHERRY, JR. | : | PETITION FOR WRIT OF CERTIORARI |
| JAMES I. WHERRY, custodian,    | : |                                 |
| ANITA I. WHERRY, custodian,    | : |                                 |
| GAYLE W. WHERRY, JEFFREY E.    | : |                                 |
| JENSEN, custodian, SEAN D.     | : |                                 |
| JENSEN, custodian, and JESSICA | : |                                 |
| A. JENSEN, custodian.          | : |                                 |
|                                | : |                                 |
| Plaintiffs,                    | : |                                 |
|                                | : |                                 |
| vs.                            | : | Case No. 900406-CA              |
|                                | : |                                 |
| WESLEY F. SINE and MELVA SINE  | : |                                 |
|                                | : |                                 |
| Defendant.                     | : |                                 |

---

PETITION FOR WRIT OF CERTIORARI

DEAN H. BECKER #261  
349 South 200 East #170  
Salt Lake City, Utah 84111  
Telephone: 801-531-0494

CLARK W. SESSIONS  
CAMPBELL, MAACK & SESSIONS  
First Interstate Plaza  
#400  
170 South Main  
Salt Lake City, Utah 84101

## TABLE OF CONTENTS

|                                                    |   |
|----------------------------------------------------|---|
| Table of Authorities .....                         | 3 |
| Questions Presented For Review .....               | 3 |
| Reference to Reports of Court of Appeals .....     | 4 |
| Concise Statement of Grounds of Jurisdiction ..... | 4 |
| Controlling Provisions of Statutes.....            | 4 |
| Statement of the Case .....                        | 4 |
| Nature of the Proceedings .....                    | 4 |
| Course of Proceedings .....                        | 4 |
| Summary of the Facts .....                         | 5 |
| Argument .....                                     | 5 |
| Appendix .....                                     | 7 |

## TABLE OF AUTHORITIES

|                                                                                        |   |
|----------------------------------------------------------------------------------------|---|
| Article VIII, Section 3 of the Constitution<br>of the State of Utah.....               | 4 |
| Utah Rules of Appellate Procedure: Rule 31a .....                                      | 3 |
| Utah Rules of Appellate Procedure: Title VII, Rule 45 .....                            | 3 |
| Utah Rules of Appellate Procedure: Rule 46(d).....                                     | 6 |
| <u>Bloor v. falstaff Brewing Corp.</u> 601 F.2d 609(2d Cir. 1979) .....                | 6 |
| <u>Joyce Beverages of N.Y.Inc.v.Royal Crown Cola,</u><br>555 F. Supp. 271 (1983) ..... | 6 |
| <u>Boggess v. Morris,</u> 635 P.2d 39 (1981) .....                                     | 4 |

## QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly consider the application of the contractual term "best efforts" in making its decision as it was applied by the parties to the disputed contract?

## REPORTS OF THE COURT OF APPEALS

The Court of Appeals issued a decision without opinion on October 22, 1991 pursuant to Rule 31(a) in which the Court of Appeals disposed of the case on its own motion.

## STATEMENT OF GROUNDS FOR JURISDICTION OF SUPREME COURT

1. The decision was rendered on October 22, 1991 by the Utah Court of Appeals, without any recitation of reasoning by the Court.

2. There was no petition for rehearing.

3. The constitutional authority granting to the Supreme Court the right to hear such case is Article VIII, Section 3 of the Constitution of the State of Utah.

4. In addition, Title VII, Rule 45, of the Utah Rules of Appellate

Procedure provides that "the review of a judgment, an order, and a decree . . . of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah."

5. The 1981 Utah Supreme Court case of Boggess v. Morris, 635 P.2d 39 states that "certiorari is available in aid of an appellate court's supervision of the actions of inferior courts, especially in implementing the process of appellate review." Id. at 42.

6. On November 21, 1991, the Applicant filed an Ex Parte Motion for Extension of Time to File Writ of Certiorari, which was heard by the Court with an extension granted to December 21, 1991 to file the Writ of Certiorari.

#### CONTROLLING PROVISIONS OF STATUTES

Applicant is not aware of any statutory matters which should be considered by the Court in this matter.

#### STATEMENT OF THE CASE

1. Nature of the Proceedings: This matter involves the interpretation of a stock purchase agreement which required the lessor to use "best efforts" to renew a lease on terms equivalent to the existing terms of the lease. The Applicants claim that the lessor failed to exercise "best efforts" to extend the lease, thereby causing the cost of the lease to increase dramatically so that the Applicants could not pay the lease, causing a forfeiture of the lease and the stock purchase agreement.

2. Course of Proceedings: The matter was tried to Judge Murphy of the Third District Court without a jury, and Judge Murphy found in favor of the Plaintiffs. The Defendants then appealed the matter to the Utah

Court of Appeals, which then dismissed the appeal without an opinion.

3. Summary of the facts:

a. Wherry (Plaintiff and Respondent) leased a newly constructed bowling alley from Skaggs Drug Center, (t, p.9-10, l.17-25) and operated the bowling center until 1979 when Sine (Defendant and Appellant) purchased the bowling alley business from Wherry. The sales agreement contains a provision which states that Wherry was to use his "best efforts" to obtain an extension of the lease agreement beyond 1984 (when the lease was due to expire) for an additional ten to fifteen years. (t., p.139-140, l. 25, 1-10)

b. Wherry testified that he used his best efforts to extend the lease (t., p. 72-73, l. 22-25, 1-9), however, Wherry's own witness, a Richard Skankey, testified that Wherry only contacted him on one occasion in the five years between 1979 and 1984. (t.p. 103-104, l. 20-25, 1-20)

c. Wherry did not obtain an extension of the lease, and the lease payments went from \$150.00 per month for common area expenses to \$2,400.00 per month. (t.p. 148, l. 19-23), which caused the business to fail.

ARGUMENT

The sole question presented for review is:

1. Did the Court of Appeals properly consider the application of the contractual term "best efforts" in making its decision as it was applied by the parties to the disputed contract?

There is no case law in Utah, and little in the United States, which

speaks directly to the question to what level of effort is required under the term "best efforts." Numerous contracts contain such terms, and it is in the best interests of the even application of justice for the Court to define the term "best efforts" and its impact on contractual law. The applicant has discovered but two cases speaking to the term "best efforts," and they are Joyce Beverages of N.Y. Inc. v. Royal Crown Cola, 555 F. Supp. 271 (1983) and Bloor v. falstaff Brewing Corp., 601 F.2d 609 (2d Cir.1979).

Rule 46(d) of the Utah Rules of Appellate Procedure indicate that the Supreme Court could consider granting a Writ of Certiorari when:

the Court of Appeals has decided an important question of municipal, state or federal law which has not been, but should be, settled by the Supreme Court.

Because contract law frequently contains the "best efforts" provision, it is incumbent upon the Supreme Court to render a decision on this matter when the Court of Appeals has refused to so decide by not rendering an opinion. Judicial economy and the interests of settling litigation in its early stages will be best served by the Supreme Court granting this Writ of Certiorari and presenting its decision on this important issue.

#### APPENDIX

The Court of Appeals did not render any opinion. The document issued by the Court of Appeals is attached.

Respectfully submitted this 30 day of December, 1991.



\_\_\_\_\_  
DEAN H. BECKER  
Attorney for Applicants



MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the foregoing  
Petition for Writ of Certiorari, postage prepaid, via United States Mail,  
to:

Clark W. Sessions  
Campbell, Maack and Sessions  
201 South Main  
Suite 1300  
Salt Lake City, Utah 84101

on the 30 day of December, 1991.

---

FILED

OCT 22 1991

*W. T. Russon*

W. T. Russon  
Clerk of the Court  
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

T.E. Wherry, T.E. Wherry, Jr., )  
James I. Wherry, custodian, )  
Anita I. Wherry, custodian, )  
Gayle W. Jensen, Jeffrey E. )  
Jensen, custodian, Sean D. )  
Jensen, custodian, and )  
Jessica A. Jensen, custodian, )

Plaintiffs and Appellees, )

v. )

Wesley F. Sine and Melva Sine, )

Defendants and Appellants. )

ORDER OF  
AFFIRMANCE

Case No. 900406-CA

-----

Before Judges Russon, Bench, and Greenwood (Rule 31).

This matter is before the court pursuant to Utah R. App. P. 31.

IT IS HEREBY ORDERED that the judgment is affirmed.

DATED this 22<sup>nd</sup> day of October, 1991.

ALL CONCUR:

*Leonard H. Russon*  
Leonard H. Russon, Judge

*Russell W. Bench*  
Russell W. Bench, Judge

*Pamela T. Greenwood*  
Pamela T. Greenwood, Judge

CORRECTED CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of October, 1991, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Dean H. Becker  
Attorney at Law  
433 South 400 East  
Salt Lake City, UT 84111

Clark W. Sessions  
Michael T. Roberts  
Campbell, Maack and Sessions  
Attorneys at Law  
First Interstate Plaza  
Suite 400  
170 South Main  
Salt Lake City, UT 84101

Dated this 23rd day of October, 1991.

By Sheri Knighton  
Deputy Clerk